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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6356

JOHN DOE, BY HIS GUARDIAN, MARY DOE, AND RICHARD ROE, BY HIS GUARDIAN, MARY ROE, PETITIONERS

v.

JOHN L. MCMILLAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR LEGISLATIVE RESPONDENTS[1]

QUESTIONS PRESENTED

1. Whether the Speech or Debate Clause of the Constitution and the official immunity doctrine preclude claims for declaratory relief, injunction and damages against Members, employees and agents of

[1] This brief is filed on behalf of the following respondents: nineteen Members of Congress who were the Chairman and some of the Members of the Committee on the District of Columbia of the House of Representatives in the 91st Congress, the clerk, staff director, counsel, a consultant and an investigator of the Committee, the Public Printer and the Superintendent of Documents.

the United States House of Representatives in connection with a valid legislative act, i.e., the publication and distribution of a duly authorized Committee report which was ordered to be printed by the House of Representatives.

2. Whether a report of a Committee of Congress, investigative in nature, constitutes a Bill of Attainder.

STATEMENT

Petitioners, who appear to be students or parents of students, seek declaratory and injunctive relief against further publication and distribution of a Congressional document, a report of a Committee of the United States House of Representatives, and sue for both punitive and compensatory damages for alleged violations of their "statutory, regulatory, administrative, common law, and constitutional rights."

The report in question (H. Rep. No. 91–1681, 91st Cong., 2d Sess. (1970)) is a study of the District of Columbia public school system, conducted on behalf of the Committee on the District of Columbia of the House of Representatives by a Special Select Subcommittee under the authority of H. Res. 76, 91st Cong., 1st Sess. (1969).[2]

In the opening pages of the report the Committee makes thirty-six specific findings, resulting from more than seven months of investigation and study and fourteen hearings at which members of the School Board and other school and city officials testified.

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[2] H. Res. 76 is reproduced as Appendix D of the petition for a writ of certiorari.

Included within the 450 page report, as a small part of the supporting data for the Committee findings, are copies of absence sheets, lists of "class cutters", copies of certain test papers and copies of various documents relating to several students who presented disciplinary problems at one school.[3] The report states that these were printed to give a realistic view of a troubled school and lack of administrative effort to rectify the problems (at p. 212); to show the poor reading ability of seventh graders given a fifth grade history test (at p. 223); to outline the egregious conduct of a student which did not result in suspension (at p. 253); and to illustrate suspension problems (at pp. 256–258). These inclusions in the report are the gravamen of petitioners' complaint against respondents on whose behalf this brief is filed. Petitioners do not contend that the Committee's investigation and report were not legitimate legislative activities or that they were otherwise beyond the scope of the Committee's authority. Their contentions are that, in divulging names from "confidential records", the part of the report against which their complaints are directed violated their right to privacy and constituted a bill of attainder (Pet. 6–8, 14).

The Committee report on which petitioners' allegations are founded was transmitted to the Speaker of the House of Representatives by the Chairman of the Committee, was committed to the Committee of the Whole House on the State of the Union and was

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[3] H. Rep. No. 91–1681, *supra*, at pp. 212–253, 256–258.

ordered to be printed by the House.[4] Thereafter the report was printed and distributed by the Government Printing Office in accordance with the dictates of 44 U.S.C. 701, 719 and 727.

ARGUMENT

I

THE SPEECH OR DEBATE CLAUSE OF THE CONSTITUTION AFFORDS TOTAL AND ABSOLUTE IMMUNITY TO THE RESPONDENTS WHO ARE MEMBERS OF CONGRESS

Article I, Section 6 of the Constitution provides that "* * * for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The protection afforded Members of Congress by this clause clearly extends to committee reports. In *Powell* v. *McCormack*, 395 U.S. 486, 502 (1969), this Court said:

> * * * we have held that it would be a "narrow view" to confine the protection of the Speech or Debate Clause to words spoken in debate. *Committee reports*, resolutions, and the act of voting are equally covered * * *. [Emphasis added.][5]

There can be no question that the report involved in this case was within the power of Congress to issue. Congress has plenary power to legislate for the Dis-

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[4] 116 Cong. Rec. 40311, and H. Rep. No. 91-1681, *supra*, at pages (I) and (V). Petitioners concede (Pet. 7) that publication and distribution of the report was "* * * by order of the full House of Representatives * * *."

[5] *Kilbourn* v. *Thompson*, 103 U.S. 168, 204 (1881), also makes express mention of committee reports being within the reason of the rule enunciated by the Speech or Debate Clause.

trict of Columbia.[6] This broad power is accompanied by inherent powers of inquiry "as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States,* 360 U.S. 109, 111 (1959).

The complaint in this case centers around a duly authorized report by a Committee of the House of Representatives which was ordered to be published by the House itself.[7] Certainly the Committee and the House were acting within "the sphere of legitimate legislative activity". *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951). This being the case, judicial inquiry should be at an end with respect to the respondent-legislators, for the Speech or Debate Clause does more than provide a defense on the merits. It protects a legislator from the annoyance and harassment of having to devote his efforts to defending himself in court against charges related to his valid legislative acts. *Powell* v. *McCormack, supra,* 395 U.S. at 502–503; *Dombrowski* v. *Eastland,* 387 U.S. 82, 84–85 (1967).

II

THE SPEECH OR DEBATE CLAUSE OF THE CONSTITUTION AFFORDS TOTAL IMMUNITY TO EMPLOYEES AND AGENTS OF CONGRESS IN THE CONTEXT OF THIS CASE

The protection of the Speech or Debate Clause extends in this case to the seven respondents who are not

[6] Art. I, Section 8 of the Constitution.

[7] In *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729 (D.D.C. 1956), a case virtually identical to the instant case on its material facts, a three-judge district court held that it was without authority to enjoin the printing and distribution of a Senate Document.

members of Congress but are clearly their employees and agents.[8]

That employees of Congress may be immune was first recognized in *Kilbourn* v. *Thompson, supra.* While the Court there found the Sergeant at Arms of the House of Representatives to be subject to civil liability for the illegal arrest of an uncooperative witness, the decision made clear that liability arose only from the lack of constitutional authority in the House to order the arrest.

In *Dombrowski* v. *Eastland, supra,* 387 U.S. at 85, this Court held that the doctrine of legislative immunity has "its roots * * * in the Speech or Debate Clause" and that it "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." In the context of this case, we submit that "less absolute" means only that, before applying the doctrine of immunity to a legislative employee or agent, the courts must first determine that he was acting within the scope of the authority vested in him in the exercise of Congress' constitutional powers. *Dombrowski* illustrates this principle. After sustaining the dismissal of the complaint as to a Senator, the Court reversed and remanded the case for further proceedings to determine whether a legislative employee had transgressed the limits of Congressional power under the Constitu-

[8] The Clerk, Staff Director, and Counsel for the Committee, an investigator for and a consultant to the Committee, and two officials of the Government Printing Office.

tion so as to expose him to liability.[9] *Powell* v. *McCormack, supra,* further supports this view of "less absolute" immunity conferred on legislative employees by the Speech or Debate Clause. Although stating that the purposes of the Clause "are fully protected if legislators are relieved of the burden of defending themselves", the Court added that it "did not regard the Speech or Debate Clause as a bar to reviewing the merits of the challenged congressional action since congressional employees were also sued." 395 U.S. at 505–506. Had this Court, in *Powell,* found in favor of the "merits of the challenged congressional action", surely the immunity would have been extended to the congressional employees.

This line between what is or is not a valid act on the part of a congressional employee is not difficult to draw. As in *Powell,* the constitutionality of the act of the employee acting at the direction of the legislature depends in turn on the constitutionality of the "underlying legislative decision". 395 U.S. at 504. The Court itself drew this line by stating (*ibid.*):

> The Court first articulated in *Kilbourn* and followed in *Dombrowski* v. *Eastland* the doctrine that, although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the *unconstitutional* activity are responsible for their acts. * * * [Emphasis added.]

[9] See also *Tenney* v. *Brandhove, supra,* 341 U.S. at 377–378, where, in discussing a possible abuse by a state legislative committee, the Court said, "The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province."

We do not have here *Kilbourn* or *Powell* situations, where constitutional sanction for the legislative decision was lacking. Neither do we have facts analogous to *Dombrowski*, where an issue as to illegally seized evidence was present. Nor do we have the situation presented to this Court in *Gravel* v. *United States* and *United States* v. *Gravel*, Nos. 71–1017 and 71–1026, pending on writs of certiorari, where a grand jury subpoena in a criminal proceeding raises issues of possible illegal acquisition of material which was incorporated into a Senate document and private republication of that document.

Rather, we have here legislative employees and agents performing those very functions which were necessary to accomplish a valid legislative act, the issuance and publication of an authorized committee report.[10]

Congress must have staff to function. The Speech or Debate Clause affords an umbrella of immunity to this staff so long as their activities are within the legislative ambit vested in Congress by the Constitution. Such is clearly the case here. To hold otherwise would frustrate the intendment of the Speech or Debate Clause and its underlying objectives.

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[10] We are aware of no contention that any of the legislative employees and agents did any act beyond the scope of their legislative duties. In fact, the complaint does not allege that Messrs. Clark, Gasque and Garber (Clerk, Staff Director and Counsel, respectively, to the Committee) did any acts whatsoever; and it is clear that the Public Printer and Superintendent of Documents did only what was required of them by statute. 44 U.S.C. 701, 719, 727.

III

THE DOCTRINE OF OFFICIAL IMMUNITY LIKEWISE AFFORDS IMMUNITY TO EMPLOYEES AND AGENTS OF CONGRESS IN THIS CASE

Whatever its doctrinal roots, whether based on the Speech or Debate Clause, separation of powers or the common law, there is a clearly enunciated judicial cloak of immunity for legislative employees and agents, the threads of which run through the cases cited in part II of this argument (all of which involved employees as well as legislators). This is based on the same logic and has the same purpose as the doctrine of official immunity enunciated in *Barr* v. *Matteo,* 360 U.S. 564 (1959). The Court there recognized that—

> officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous and effective administration of policies of government. * * * The privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy. 360 U.S. at 571, 572–573.

A question of immunity for a legislative employee was before the Court in *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963). The complaint alleged that Wheeler, an investigator for a House committee, had filled in the plaintiff's name on a subpoena without authorization of the committee, the subpoena having been signed in blank by the chairman. The Court sustained dismissal of the complaint on another ground, but also clearly recognized that the test of liability was whether Wheeler was "acting sufficiently within the scope of his authority to bring the [immunity] doctrine into play." 373 U.S. at 651. The immunity doctrine referred to in *Wheeldin* was not that under the Speech or Debate Clause but the broad and absolute immunity of any government employee acting within the scope of his authority, or as stated in *Barr* v. *Matteo,* 360 U.S. at 575, for "action * * * taken * * * within the outer perimeter of [the] line of duty * * *".[11]

The legislative employees and agents in this case were clearly acting well within the "outer perimeter" of their duty: the staff of the Committee were functioning to assist Members of Congress in accomplishing a valid legislative act; and the officials of the Government Printing Office, in printing the report,

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[11] Judicial officers are also immune from actions for civil damages caused by their judicial acts. *Bradley* v. *Fisher*, 13 Wall. 335 (1872). See also *Gregoire* v. *Biddle*, 177 F. 2d 579 (C.A. 2, 1949), cert. denied, 339 U.S. 949, for an enunciation of the rationale of the official immunity doctrine by Judge Learned Hand.

were acting at the express direction of the House and, in fact, pursuant to statute.[12]

IV

THE DOCTRINES OF SEPARATION OF POWERS AND JUDICIAL RESTRAINT PRECLUDE JUDICIAL REVIEW OF THE ACTIONS OF CONGRESS IN THIS CASE

Since 1805 this Court has wisely recognized limitations upon judicial review of actions of the legislative branch. Chief Justice Marshall, speaking for the Court in *United States* v. *Fisher,* 2 Cranch 358, 396 (1805), stated: "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution."

In *McCulloch* v. *Maryland,* 4 Wheat. 316, 423 (1819), Chief Justice Marshall reiterated this concern in stating that "to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretension to such a power."

Within the framework of these pronouncements, the complaint in this case must fail. Petitioners seek injunctive relief against further official publication and distribution of a valid and authorized document of the House of Representatives and seek damages against Congressmen, their employees and agents, for its initial official publication. The ground for this relief is alleged to be an invasion of privacy by including

[12] See note 10, *supra*, p. 8.

the names of students in the document in a derogatory context.

We submit that there exists no legally recognizable right of privacy militating against such inclusion. If we assume such a right, *arguendo,* whatever penumbra of privacy may exist must bow to the right and prerogative of Congress to pursue legitimate legislative objectives by means of its choice, in this case by the time-honored means of committee inquiry and report. To hold otherwise would open a veritable Pandora's box of judicial review of valid Congressional activities and create needless friction between coordinate branches of government.

It is, of course, true that the courts have the power to review legislative acts, and there are times when the deference due a coordinate branch of government must yield to the necessity for judicial review of a particular issue. But the circumstances under which review is undertaken should be exceptional. Contrary to petitioners' contention (Pet. 25–26) that none of the criteria barring judicial review under the separation of powers doctrine as set forth disjunctively in *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), and reiterated in *Powell* v. *McCormack, supra,* 395 U.S. at 518–519, is present in this case, some, at least, of those criteria are clearly involved and any one of them precludes a finding of justiciability in the questions petitioners would have the Court adjudicate. To paraphrase the criteria, there is in this case "a textually demonstrable constitutional commitment of the issue to a coordinate political department," principally in Article I, Section 8 of the Constitution vesting in Congress plenary

legislative authority over the District of Columbia; there is "the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion", i.e., the determination of the House Committee on the District of Columbia to include in its report the materials upon which petitioners' complaint is based and the decision of the House itself to print the report; and there is "the impossibility of a court's undertaking independent resolution [of the question of including these materials] without expressing lack of the respect due coordinate branches of government." Singly and together these principles dictate rejection of petitioners' contentions.[13]

V

THE LEGISLATIVE ACTION COMPLAINED OF DOES NOT CONSTITUTE A BILL OF ATTAINDER

Petitioners contend that the House of Representatives' publication of the report in question constitutes a bill of attainder (Pet. 19–22). The court below held that this contention, like their other claims of violations of their rights, is unavailing in view of the lack of jurisdiction in the courts to review this legislative action (Pet. App. A., pp. 4–5, 6).[14]

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[13] See also *Cole* v. *McClellan*, 439 F. 2d 534, 536 (C.A.D.C. 1970), for a recent application of judicial restraint in connection with information delivered to a Congressional committee as to which there were only the vaguest allegations of anticipated harm.

[14] The dissenting judge below noted this contention and petitioners' further claim of a violation of due process, but found it unnecessary to "reach those questions" (Pet. App. A, p. 43).

The contention is in any event without merit. By definition—

> * * * "A bill of attainder, by the common law, as our fathers imported it from England and practiced it themselves, before the adoption of the Constitution, was an act of sovereign power, *in the form of a special statute* * * * by which a man was pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment *per legem terrae*." Farrar, Manual of the Constitution (1867) 419. * * * It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's interests indicated a judicial trial, that the Constitution prohibited. * * * *United States* v. *Lovett,* 328 U.S. 303, 322 (1946), Frankfurter, J., concurring. [Emphasis added.]

However the term may be defined, it is clear that a bill of attainder is a legislative enactment. This is demonstrated by the very authorities petitioners cite in support of their contention—*Cummings* v. *Missouri,* 4 Wall. 277 (1867); *United States* v. *Lovett, supra; United States* v. *Brown,* 381 U.S. 437 (1965); *Wisconsin* v. *Constantineau,* 400 U.S. 433, 443 (1971), Black, J., dissenting. All of these cases involved a legislative act in the form of an enactment.[15] Thus,

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[15] In the *Cummings* case the bill of attainder was enacted as part of the post-Civil War constitution of Missouri. The *Constantineau* case involved administrative action under the authority of a state statute. In the dissenting opinion upon which petitioners rely (Pet. 22), Mr. Justice Black said only that the effect of the "sweeping powers" granted by the statute "is practically the same as that of an old common-law bill of attainder." 400 U.S. at 444.

petitioners' attempt to equate the House's publication of the committee report to an enacted law, the only form of legislative action which can constitute a bill of attainder, is contrary to reason and authority.

CONCLUSION

The petition for a writ of certiorari should be denied as to respondents on whose behalf this brief is filed.

Respectfully submitted.

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